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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6 SAN JOSE DIVISION

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8 BOARD OF TRUSTEES OF THE  
9 LABORERS HEALTH AND WELFARE  
TRUST FUND FOR NORTHERN  
CALIFORNIA, et al.,

10 Plaintiffs,  
11 v.  
12 CEM BUILDERS, INC.,  
13 Defendant.

Case No. [5:18-cv-00685-EJD](#)

**ORDER GRANTING PLAINTIFFS'  
SECOND MOTION FOR RIGHT TO  
ATTACH ORDER AND WRIT OF  
ATTACHMENT**

Re: Dkt. No. 14

14  
15 On January 31, 2018, Plaintiffs filed a complaint against Defendant, seeking damages for  
16 breach of a collective bargaining agreement, recovery of unpaid trust fund contributions, and  
17 injunctive relief. Dkt. No. 1 (“Compl.”). Plaintiffs now move for a right to attach order and writ  
18 of attachment of two of Defendant’s bank accounts, as well as “any of Defendant’s accounts  
19 receivable, other later identified checking accounts held in its names, and any proceeds from the  
20 sale of its business assets.” Dkt. No. 14 (“Mot”), at 14. Defendant has been served with a copy of  
21 the Complaint and a previous version of Plaintiffs’ motion, Dkt. No. 12, but has not yet appeared  
22 or filed a response. For the reasons discussed below, Plaintiffs’ motion is GRANTED.

23

**I. BACKGROUND**

24

**A. Factual Background**

25

Plaintiffs are the boards of trustees of several trust funds, which serve to provide employee  
26 benefit plans created by written trust agreements subject and pursuant to §§ 3(3) and 3(37) of

27

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1 ERISA, 29 U.S.C. §§ 1002(3) and (37). Compl. ¶ 3; Declaration of Michele Lauziere (“Lauziere  
2 Decl.”), Dkt. No. 16, at ¶ 4. The trust funds were established through collective bargaining  
3 agreements between the Northern California District Council of Laborers (“Laborers Union”) and  
4 employer associations representing construction industry employers. *Id.*

5 On or about June 8, 2006, Defendant entered into a Memorandum Agreement in which it  
6 agreed to be bound to the terms of one of these collective bargaining agreements, the Laborers’  
7 Master Agreement for Northern California (“Master Agreement”). Lauziere Decl. ¶ 6; Compl.  
8 ¶ 9. The Master Agreement provided that “each individual Employer shall pay hourly  
9 contributions for each hour paid for and/or worked [by a covered employee], including overtime  
10 pay, shift pay, show-up time pay and similar payments.” Lauziere Decl., Ex. G (“Master  
11 Agreement”), at § 28A. According to Plaintiffs,

12 [i]t is the usual practice of the Fund Office to send each employer a  
13 monthly Combined Employer Report of Contributions form showing  
14 the contribution rate per hour of covered work. The employer is to  
15 fill out the form, showing the total number of hours of covered work  
16 performed in the reporting month, and calculating the amount due  
for the employer’s contribution. . . . The employer is to return the  
completed Employer Report of Contributions form, along with its  
payment for the contributions due, by the 25th day of the month  
following the month in which the hours were worked.

17 Lauziere Decl. ¶ 7.

18 The Master Agreement also provided for certain penalties that would be incurred if a  
19 participating employer became delinquent in its contributions:

20 Any Individual Employer who is found to be delinquent as a result  
21 of an audit will pay and satisfy such delinquency with accrued  
22 interest and in addition pay liquidated damages. All delinquent  
23 contributions shall bear simple interest at the rate of one and one-  
24 half percent (1.5%) per month until receipt of payment. Subject to  
25 accounting verification, liquidated damages shall be assessed on  
delinquent contributions at a flat rate of one hundred and fifty  
26 dollars (\$ 150.00) per month to reflect the internal administrative  
27 costs incurred by the trust administrators in monitoring and tracking  
such late contributions.

28 Master Agreement § 28A. This was also reflected in the Liquidated Damages Program—Board  
Policy, which stated in relevant part that:

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Liquidated damages and interest will be assessed under the following conditions:

Employer's original report is postmarked after the 25th day of the month following employment. If contributions are paid within thirty (30) days of the due date, the employer will only be assessed the flat fee of \$ 150.00. If contributions are paid more than thirty (30) days after they become due, the employer will be assessed interest at the rate of one and one-half percent (1.5%) per month until contributions are paid in full.

Lauzieres Decl., Ex. H.

Plaintiffs report that, beginning in June 2015, Defendant failed to timely pay certain contributions which it reported as due and owing. Specifically, during the periods June-December 2015, January-September 2016, December 2016, and January-March 2017, Defendant paid its contributions but not on time. Lauziere Decl. ¶ 17. During the periods May-August 2017, November 2017, and December 2017, Defendant did not pay its contributions at all. *Id.* ¶ 18.

Plaintiffs now seek payments and penalties which are due and owing under the terms of the Master Agreement, as well as associated attorneys fees and costs. Specifically:

- For the periods June-December 2015, January-September 2016, December 2016, and January-March 2017 where Defendant paid its contributions but not on time, Plaintiffs assert that section 28A of the Master Agreement entitles them to 1.5% interest and \$150 liquidated damages, both assessed on a per-month basis until the full payment is received. *See* Master Agreement § 28A. Plaintiffs calculate that, for all of the payments Defendant did not make on time, they are owed **\$11,864.13** in interest and liquidated damages. Lauziere Decl. ¶ 17 and Ex. I (chart showing per-month breakdown liquidated damages and interest incurred due to late payments).
- For the periods May-August 2017, November 2017, and December 2017 where Defendant did not pay its contributions owed, Plaintiffs argue that 29 U.S.C. §§ 1134(g)(2) entitles them to recover **\$327,931.12**, broken down as follows: (1) **\$303,850.68** in “unpaid contributions,” § 1132(g)(2)(A); (2) **\$12,040.22** in “interest on the unpaid contributions,” § 1132(g)(2)(B), calculated using the per-month 1.5%

1 interest and \$150 liquidated damages fee under section 28A of the Master Agreement;  
2 and (3) **\$12,040.22** in “an amount equal to the greater of-- interest on the unpaid  
3 contributions, or liquidated damages provided for under the plan. . . ,”

4 § 1132(g)(2)(C).<sup>1</sup> Lauziere Decl. ¶¶ 18-28 and Ex. J (chart of per-month unpaid  
5 contributions) and Ex. V (chart of per-month liquidated damages and interest).

6 • Plaintiffs also seek attorneys fees and costs incurred by its counsel in the underlying  
7 collection efforts and in this litigation, which total **\$14,961.00**. Declaration of C. Todd  
8 Norris (“Norris Decl.”), Dkt. No. 17, at ¶ 16 and Ex. B.

9 In total, Plaintiffs seek **\$354,756.25**. Lauziere Decl. ¶ 31.

10 Plaintiffs report that, in the preceding months, they have attempted to recover this amount  
11 due and have been unsuccessful. On January 8, 2018, Plaintiffs sent Defendant an email to inquire  
12 about its delinquency and plans for payment. Declaration of Candace Holzapple (“Holzapple  
13 Decl.”), Dkt. No. 15, at ¶ 5 and Ex. A. The following day, Defendant’s bookkeeper, Michele  
14 Lyden, sent an email stating that “Tucker [(Defendant)] is going out of business. We are planning  
15 on paying Laborers [(Plaintiffs)] in the next couple of weeks when proceeds from the sale of one  
16 our divisions is received.” *Id.*; *see also* Lauziere Decl. ¶ 35. To date, Defendant has not sent any  
17 such payment. Holzapple Decl. ¶ 6. On February 5, 2018, Plaintiffs followed up with Defendant  
18 and requested copies of recent payroll records. Holzapple Decl. ¶ 7 and Ex. B. The following  
19 day, Ms. Lyden responded that “I have no money to pay Rachel to pull the reports. I have no  
20 money to pay me to work either.” *Id.* As of February 5, 2018, the California Secretary of State  
21 reports Defendant’s status in the California Business Search as “suspended.” Norris Decl. ¶ 10  
22 and Ex. C.

23 **B. Procedural History**

24 Plaintiffs commenced this lawsuit on January 31, 2018. Dkt. No. 1. On February 6, 2018,

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26 <sup>1</sup> According to Plaintiffs, the “interest on the unpaid contributions” totals \$12,040.22 and the  
27 “liquidated damages provided for under the plan . . .” totals \$750, so they are entitled to  
\$12,040.22 under § 1132(g)(2)(C).

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1 Plaintiffs moved *ex parte* to attach two of Defendant's bank accounts. Dkt. Nos. 7, 10. The Court  
2 denied Plaintiffs' motion because they had not sufficiently demonstrated "great or irreparable  
3 injury" and instead directed Plaintiffs to serve Defendants with a copies of the Complaint,  
4 Plaintiffs' *ex parte* motion, and the Court's order. Dkt. No. 11. Plaintiffs served Defendant the  
5 following day. Dkt. No. 12.

6 On February 22, 2018, the Court held a hearing on Plaintiffs' motion. Dkt. No. 13. Only  
7 Plaintiffs' counsel appeared. *Id.* During the hearing, the Court determined that it would allow  
8 Plaintiff to again move for attachment *ex parte*. *Id.*

9 Plaintiffs filed the instant motion the following Monday. Dkt. No. 14. This second motion  
10 seeks to attach the two bank accounts identified in Plaintiffs' original motion, as well as "any of  
11 Defendant's accounts receivable, other later identified checking accounts held in its names, and  
12 any proceeds from the sale of its business assets." *Id.* at 14. To date, no counsel has appeared for  
13 Defendant nor has Defendant otherwise responded to Plaintiffs' motions.

14 **II. LEGAL STANDARD**

15 Under Federal Rule of Civil Procedure 64, "[e]very remedy is available that, under the law  
16 of the state where the court is located, provides for seizing a person or property to secure  
17 satisfaction of the potential judgment." Fed. R. Civ. P. 64(a). These remedies include attachment.  
18 Fed. R. Civ. P. 64(b).

19 In California, the procedures and grounds for obtaining orders permitting pre-judgment  
20 writs of attachment are governed by the California Code of Civil Procedure, section 481.010 et  
21 seq. In general, an order of attachment may be issued only in an action for a claim of money  
22 based on an express or implied contract where the total amount of such claim is a fixed or "readily  
23 ascertainable" amount not less than \$500.00. Cal. Code Civ. Proc. § 483.010(a).

24 California Code of Civil Procedure § 484.090 provides that before an attachment order is  
25 issued, the court must find all of the following: (1) the claim upon which the attachment is based is  
26 one upon which an attachment may be issued; (2) the applicant has established "the probable

1 validity" of the claim upon which the attachment is based; (3) the attachment is not sought for a  
2 purpose other than recovery on the claim upon which the request for attachment is based; and  
3 (4) the amount to be secured by the attachment is greater than zero. Cal. Code Civ. Proc.

4 § 484.090(a). In addition, a writ of attachment will not be issued if the property to be attached is  
5 exempt. *See* Cal. Code Civ. Proc. § 484.090(b); *id.* § 487.020.

6 California Code of Civil Procedure sections 485.010, et seq. provide a procedure to obtain  
7 a writ of attachment without a noticed hearing. A court "shall issue a right to attach order" if, in  
8 addition to the five requirements described above, "[t]he plaintiff will suffer great or irreparable  
9 injury . . . if issuance of the order is delayed until the matter can be heard on notice." Cal. Code  
10 Civ. Proc. § 485.020(a). A plaintiff will suffer "great or irreparable injury" if it "appears from  
11 facts shown by affidavit" that any of the following are true:

12 (1) Under the circumstances of the case, it may be inferred that there  
13 is a danger that the property sought to be attached would be  
14 concealed, substantially impaired in value, or otherwise made  
unavailable to levy if issuance of the order were delayed until the  
matter could be heard on notice.

15 (2) Under the circumstances of the case, it may be inferred that the  
16 defendant has failed to pay the debt underlying the requested  
17 attachment and the defendant is insolvent in the sense that the  
18 defendant is generally not paying his or her debts as those debts  
19 become due, unless the debts are subject to a bona fide dispute.  
Plaintiff's affidavit filed in support of the ex parte attachment shall  
state, in addition to the requirements of Section 485.530, the known  
undisputed debts of the defendant, that the debts are not subject to  
bona fide dispute, and the basis for plaintiff's determination that the  
defendant's debts are undisputed.

20 (3) A bulk sales notice has been recorded and published pursuant to  
Division 6 (commencing with Section 6101) of the Commercial  
Code with respect to a bulk transfer by the defendant.

21 (4) An escrow has been opened pursuant to the provisions of Section  
24074 of the Business and Professions Code with respect to the sale  
22 by the defendant of a liquor license.

23 (5) Any other circumstance showing that great or irreparable injury  
would result to the plaintiff if issuance of the order were delayed  
until the matter could be heard on notice.

24 Cal. Code Civ. Proc. § 485.010(b).

25 The moving party bears the burden of establishing its entitlement to an order of  
26 attachment. *Loeb and Loeb v. Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1116 (1985).

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1 The application for a right to attach order must be supported by an affidavit or declaration showing  
2 that the applicant, on the facts presented, would be entitled to a judgment on the claim upon which  
3 the proposed attachment is based. Cal. Code Civ. Proc. § 484.030. The affidavit or declaration  
4 must state the facts “with particularity.” Cal. Code Civ. Proc. § 482.040.

5 **III. DISCUSSION**

6 In order to determine whether Plaintiffs are entitled to the order and writ they seek, the  
7 Court applies the six factors set forth in Cal. Code Civ. Proc. § 485.020(a).

8 **A. The Claim Supporting Attachment**

9 A claim is one upon which an attachment may be issued if the claim is (1) “for money . . .  
10 based upon a contract, express or implied,” (2) of a “fixed or readily ascertainable amount not less  
11 than \$500,” (3) which is either unsecured or secured by personal property, and (4) is a  
12 “commercial claim.” Cal. Code Civ. Proc. § 483.010; *see also Douglas v. Smith*, No. 09-1365,  
13 2010 WL 1734903, at \*1 (C.D. Cal. Apr. 28, 2010).

14 Here, Plaintiff’s claim is for money and is based on an express contract, the Memorandum  
15 Agreement (and, consequently, the Master Agreement) which Defendant entered into in 2006.  
16 *Lauziere Decl.* ¶¶ 4, 6; *see also Compl.* ¶¶ 8-24.

17 The claim is also for a “readily ascertainable amount” that is not less than \$500. First, the  
18 unpaid contributions for May-August 2017, November 2017, and December, 2017 that Plaintiffs  
19 claim they are owed under 29 U.S.C. § 1132(g)(2)(A) can be derived from totaling contribution  
20 amounts that Defendants themselves reported. *See Lauziere Decl.*, Exs. K-U. Second, the various  
21 interest payments which Plaintiffs seek appear to be a reasonable and definite application of the  
22 terms of the contract. *See CIT Grp./Equip. Fin., Inc. v. Super DVD, Inc.*, 115 Cal. App. 4th 537,  
23 540 (2004) (“[A]n attachment will lie upon a cause of action for damages for a breach of contract  
24 where the damages are readily ascertainable by reference to the contract and the basis of the  
25 computation of damages appears to be reasonable and definite.”). For example, for the interest  
26 incurred by late payments in June-December 2015, January-September 2016, December 2016, and

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1 January-March 2017, Plaintiffs seem to have reasonably calculated this amount by applying the  
2 1.5% interest rate and \$150 flat fee required under Section 28A of the Master Agreement to the  
3 contributions reported for those months. *See Ex. I.* The same can be said of Plaintiffs' calculation  
4 of interest owed from Defendant's failure to make payments for the months of May-August 2017,  
5 November 2017, and December, 2017. *See Ex. J.* Third and finally, the attorneys fees seem  
6 reasonably discernable from Plaintiffs' counsel's billing records. *See Norris Decl., Ex. B.*

7 The final two requirements of § 483.010 are also met. Plaintiffs' claim is not "secured by  
8 any interest in real property." Cal. Code Civ. Proc. § 484.10(b). In addition, it is a "commercial  
9 claim," as it is not a claim against an individual. *See Cal. Code Civ. Proc. § 484.10(c).*  
10 Accordingly, Plaintiff's claim is one for which attachment is available.

11 **B. Probable Validity**

12 A claim has "probable validity" where "it is more likely than not that the plaintiff will  
13 obtain a judgment against the defendant on the claim." Cal. Code Civ. Proc. § 481.190. In other  
14 words, a plaintiff must establish a *prima facie* case. *Plata v. Darbun Enter., Inc.*, No. 09-44, 2009  
15 WL 3153747, at \*4 (S.D. Cal. Sept. 23, 2009). Under California law, to establish a *prima facie*  
16 case for a breach of contract, a plaintiff must show (1) a contract, (2) plaintiff's performance or  
17 excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff. *Walsh v. West*  
18 *Valley Mission Cnty. College Dist.*, 66 Cal. App. 4th 1532, 1545 (1998).

19 For the purposes of this motion, Plaintiffs have made such a showing. First, Plaintiffs have  
20 established that there was a contract between Plaintiffs and Defendant. *Lauziere Decl.* ¶¶ 4, 6.  
21 Second, Plaintiffs performed by providing benefits to covered employees. *Id.* ¶ 13. Third,  
22 Defendant breached by failing to timely pay contributions which it reported as owing. *Id.* ¶¶ 17,  
23 18. Fourth, Defendant's breach resulted damage to Plaintiffs—\$303,850.68 in unpaid  
24 contributions and up to \$35,944.57 in interest and liquidated damages. *Id.* ¶¶ 29, 31. Thus,  
25 Plaintiffs' claim has "probable validity."

### C. Purpose of Recovery

The attachment sought is for the sole purpose of preserving Plaintiffs' right to recover their damages as a result of Defendant's alleged breach, not for anything other than that claim. *See id.*

¶ 35. Plaintiffs have met this element.

#### **D. Exemption from Attachment**

The attachment sought does not fall within any exemptions. Defendant is a corporation and, as such, “all corporate property for which a method of levy is provided . . .” may be attached. Cal. Code Civ. Proc. § 487.010(a). Here, at least §§ 488.455 and 488.470 provide such a method of levy for the bank accounts that Plaintiffs seek to attach. In addition, none of the exemptions provided in § 487.020 apply. Defendant’s bank accounts are commercial accounts, not personal accounts used for the support of natural persons or their dependents. *See* Cal. Code Civ. Proc. § 487.020. In addition, there is no evidence that Plaintiffs’ claim has been discharged or the prosecution of this action has been stayed due to bankruptcy. Norris Decl. ¶ 5. Accordingly, the attachment Plaintiffs seek is not exempt under California law.

## E. Irreparable Harm

As discussed above, a plaintiff can show “great or irreparable injury” by demonstrating any of the five circumstances described in § 485.010(b), including: (1) “danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable to levy . . . ;” (2) “that defendant has failed to pay the debt underlying the requested attachment and the defendant is insolvent . . . ;” and (3) “[a]ny other circumstance showing great or irreparable injury . . . .” § 485.010(b)(1), (2), and (5).

At least this final circumstance is present here. Given Defendant's continued and longstanding failure to pay its debts owed to Plaintiffs (*see* Lauziere Decl. ¶¶ 17-31 and Exs. I-V), its suspended corporate status (*see* Norris Decl., Ex. C), and the recent history of Plaintiffs' several attempts to contact and recover money from Defendant (*see* Holzapple Decl. ¶¶ 5-7 and

1 Exs. A-B; *see also* Lauziere Decl. ¶ 33),<sup>2</sup> it seems that Defendant is indeed shuttering its business  
2 and its resources (to the extent they remain) are rapidly dwindling. The fact that Defendant,  
3 despite being served with Plaintiffs' Complaint and a previous version of this *ex parte* motion, has  
4 not responded or otherwise attempted to defend itself in this case underscores the direness of this  
5 situation. *See* Dkt. Nos. 12, 13. Accordingly, the totality of the circumstances here suggest that  
6 Plaintiffs will indeed suffer "great and irreparable injury" if attachment is further delayed.

7 **F. Greater than Zero**

8 The attachment sought is for \$354,756.25, an amount greater than zero. *Id.* ¶ 31. Plaintiffs  
9 have satisfied this sixth and final element, and thus meet all the requirements for issuing a right to  
10 attach order and writ of attachment under § 485.020(a).

11 **IV. ORDER**

12 For the foregoing reasons, Plaintiffs' application for a right to attach order and writ of  
13 attachment against Defendant is GRANTED in the amount of **\$354,756.25** against: (a) the  
14 following two bank accounts belonging to Defendant: Avidbank, 400 Emerson Street, Palo Alto,  
15 California 94301; Account No. 0140017658; and Account No. 0140016007; (b) any accounts  
16 receivable belonging to Defendant; and (c) any proceeds resulting from the sale of Defendant  
17 and/or the sale of any of its assets.

18 ACCORDINGLY, THE CLERK OF COURT SHALL ISSUE forthwith the Writ of  
19 Attachment, attached hereto as Exhibit A.

20 IT IS HEREBY FURTHER ORDERED THAT: upon service of the Writ of Attachment  
21 upon Avidbank, Plaintiffs shall cause this Order, the attached Writ of Attachment and all moving  
22 papers in support thereof to be promptly served upon Defendant along with the Notice of  
23 Attachment required by Cal. Code Civ. Proc. § 484.050.

24 \_\_\_\_\_  
25 <sup>2</sup> Statements by Ms. Holzapple and Ms. Lauziere regarding what Ms. Lyden (Defendant's  
26 bookkeeper) told them, as well as copies of emails showing the same, are hearsay and the Court  
27 cannot rely on them for the truth of the matter asserted. *See* Cal. Evid. Code § 1200. The Court  
nevertheless relies on these statements and emails as evidence of Plaintiffs' frustrated efforts to  
collect its debts owed by Defendant.

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1           IT IS HEREBY FURTHER ORDERED THAT until further order by this Court, Defendant  
2 shall not (a) transfer any funds held in any deposit account (including, but not limited to, its  
3 Avidbank Account Nos. 0140017658 and 0140016007) except as expressly permitted by statute;  
4 (b) with respect to any accounts receivable, proceeds from the sale of the company or any of its  
5 assets, proceeds of any claims or funds received, insurance proceeds, or other funds received, take  
6 any action other than depositing such funds into the accounts; (c) sell, transfer or encumber its real  
7 or personal property, if any; and (d) assign, settle, transfer or encumber any litigation claims.

8           **IT IS SO ORDERED.**

9           Dated: February 27, 2018



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11           EDWARD J. DAVILA  
12           United States District Judge

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